

84-765

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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

EVELYN HILLIER, Individually and as Administratrix of
the Estate of Henry Hillier, Deceased,
Petitioners,

vs.

SOUTHERN TOWING COMPANY, et al.,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

JEROME J. SCHLICHTER*
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QUESTION PRESENTED

Whether loss of society is an exception to the rule under general maritime law that pre-judgment interest applies to non-pecuniary damages recoverable for death resulting from injuries on territorial waters.



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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Evelyn Hillier respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding August 3, 1984.

OPINION BELOW

The opinion of the Court of Appeals is reported at 740 F.2d 583 (7th Cir. 1984), a copy is attached as Appendix A. The opinion of the District Court is reported at ____ F.Supp. ____ (N.D. Ill 1983), a copy is attached as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered August 3, 1984. Rehearing was not sought. This petition for certiorari is filed within 90 days of that date. Jurisdiction of this court is invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

This suit arises from the September, 1979 death of Henry Hillier, a 23-year old seaman, as a result of an unfortunate work-related exposure to a cloud of dangerous gases. Hillier was survived by his widow and a young minor daughter. The defendants-respondents filed petitions for exoneration or limitation of liability in admiralty. Prior to trial, the defendants filed unqualified admissions of liability. The case was tried in Admiralty under general maritime law solely on the issue of damages. There was a contemporaneous companion jury trial against Southern Towing, which is not involved in the present appeal; the jury there served in an advisory capacity to the admiralty court herein.

The district court judge adopted the jury's assessment of damages at \$520,000.00 and entered judgment in that amount. The damages awards relevant to this petition are: \$172,743.65 for loss of society; \$5,000 for decedent's conscious pain and suffering; \$210,000 as the present value of the future loss of support (discounted to time of trial); and \$95,000 as the present value of future services. Also awarded were : \$35,000 for past support; and \$6,583.35 for past loss of services.

The district court awarded pre-judgment interest only on past loss of support and services, discounted future losses to the date of trial and withheld pre-judgment interest on the remaining damages for the stated reason that "the law does not allow for [it]." (App. B p. A-10) The Seventh Circuit Court of Appeals on review affirmed the trial court's conclusion that the law does not allow for pre-judgment interest on future pecuniary losses which had been discounted to their present value as of the date of trial and held: "[W]e reverse and remand that portion of the case denying the plaintiff pre-judgment interest for pain and suffering or for past loss of society." (App. A p. A-7) Plaintiff appeals from the portion of the judgment of the appellate court limiting pre-judgment interest to past loss of society.

ARGUMENT

This writ should be allowed because the issue of recovery of pre-judgment interest on an award for loss of society for death resulting from injury on territorial waters under general maritime law has not been determined by this court and the absence of judicial guidelines for the application of pre-judgment interest has resulted in the denial of complete compensation for maritime injuries and death. In addition, the decision of the Court of Appeals below limiting pre-judgment interest to past loss of society is in conflict with decisions in other circuits.

The district court below specifically divided the awards for loss of support and for loss of services into past and future categories. (App. B p. A-9-10) Future losses were discounted and given present value at the time of trial. The trial court, however, did not make express findings of future and past loss of society or pain and suffering. Instead, it rendered lump sum damages both for loss of society and for pain and suffering (App. B p. A-10).

On appeal, the Seventh Circuit accepted the lump sum award as the basis for allowing a pre-judgment interest on pain and suffering, but it rejected the lump sum award for loss of society to the extent that it remanded for determination of pre-judgment interest based only upon "past loss of society." Under the facts and findings of this case, the decision of the Seventh Circuit is in conflict with the holdings and policy established by the United States Supreme Court and the courts of other circuits. Further, this case illustrates the need for standards for District Courts to follow in assessing pre-judgment interest on awards for loss of society in cases of wrongful death brought under general maritime law. The district court's unitary award for loss of society supports recovery of pre-judgment interest for the entire award, and not just for some past component of lost society.

The Supreme Court established a remedy for maritime wrongful death in the watershed case of *Moragne v. States Marine Lines Inc.*, 398 US 375, 90 S.Ct. 1772, 26 L.Ed 2d 339 (1970) by permitting recovery under the unseaworthiness doctrine for death in territorial waters. The *Moragne* court sought to "assure uniform vindication of federal policies." 398 US at 401, 90 S.Ct. at 1788, 26 L.Ed. 2d at 357. *Moragne* specifically did not resolve how damages would be determined under general maritime law.

Four years later, in *Sea-Land Services v. Gaudet*, 414 US 573, 94 S.Ct. 806, 39 L.Ed 2d 9 (1974), the Supreme Court held that under *Moragne* a longshoreman killed in inland waters could recover damages for loss of society. The *Gaudet* court explained: "[O]ur decision is compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for these who are injured within its jurisdiction." 415 US at 588, 39 L.Ed 2d at 23.

Damages for loss of society are intangible and accrue at the moment of death. Loss of society, as noted in *Gaudet*, "[e]mbraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort and protection." 414 US at 585, 94 S.Ct. at 815, 39 L.Ed. 2d at 21. The determination of damages for loss of society turns mainly upon a good sense determination of what is just compensation, employing an analysis akin to that used in tortious injury cases. 414 US at 589-590, 39 L.Ed. 2d at 23-24. See *Moragne*, 398 US at 406, 26 L.Ed 2d at 360. Cf. *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 886 (8th Cir. 1980) (Pain and suffering not reducible to precise calculation).

As a rule, under general maritime law, pre-judgment interest is allowed on damage awards from the date of loss. *American Zinc Co. v. Foster*, 441 F.2d 1101 (5th Cir. 1971); *National Airlines, Inc. v. Stiles*, 268 F.2d 400, 405 (5th Cir. 1959); *Elgin*,

J. & E. Ry. Co. v. American Commercial Lines, 317 F.Supp. 175, 177 (N.D. Ill. 1970). Cf. *Independent Bulk Transport, Inc. v. Vessel Morania Abaco*, 676 F.2d 23 (2d Cir. 1982) (Abuse of discretion to deny pre-judgment interest except in exceptional circumstances); *Gardner v. National Bulk Carriers, Inc.*, 333 F.2d 676, 677 (4th Cir. 1964) (Not abuse to grant pre-judgment interest when award computed from date of death). Pre-judgment interest is the method by which the party who suffered the loss may recover the value of the actual loss suffered by compensating for the deficiency which arises during the period from the date the injury was sustained to the date of payment. It compensates for the use of the monetary award in the control of the defendant under the doctrine of *restitutio in integrum*. *Stiles*, 268 F.2d at 405.

In this context, it is important to note that, under general maritime law, whether a claim is unliquidated or liquidated is irrelevant to determination of pre-judgment interest. *First Nat. Bank of Chicago v. Material Serv. Corp.*, 597 F.2d 1110, 1121 (7th Cir. 1979), citing *Stiles*, 268 F.2d at 405. Thus, damage sustained of a non-pecuniary nature is recoverable as of a certain date, regardless of when the amount is judicially ascertained. Pre-judgment interest simply compensates for the difference in the value of the award at payment and the value of that award at the time of the injury or death.

Pre-judgment interest may be recovered upon an award for loss of society under general maritime law without division into future and past losses. *Drachenberg v. Canal Barge Co., Inc.*, 621 F.2d 760 (5th Cir. 1980); *Complaint of Metcalf*, 530 F.Supp. 446, 460-461 (S.D. Tex. 1981); *Consolidated Machines, Inc. v. Protein Products Corp.*, 428 F.Supp. 209 (M.D. Fla. 1976). Such treatment is consistent with the line of cases allowing pre-judgment interest from the time of death on awards for pain and suffering under the theory that pain and suffering are not reducible to precise calculation. See, e.g., *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 594 (2d

Cir. 1961); *Consolidated Machines, Inc. v. Protein Prod. Corp.*, 428 F.Supp. 209, 240-241 (M.D. Fla. 1976); *Petition of Marina Mercante Nicaraguense, S.A.*, 248 F.Supp. 15, 25 (S.D.N.Y. 1965).

As distinct from the treatment of damages for pecuniary losses such as lost earnings or services, damages for loss of society are not discounted to the date of trial. Cf. *Consolidated Machines, Inc. v. Protein Prod. Corp.*, 428 F.Supp. 209, 230-231 (M.D. Fla. 1976) (loss of society requires different analysis from post-award pecuniary damages). Discounting is premised on the theory that the plaintiff who receives payment for losses which will not accrue until some future date would be over-compensated unless the sum is reduced to account for the interest he will receive upon investment of the award. Discounting establishes the amount of money that will produce the decedent's lost future earnings or support if the award is invested at prevailing interest rates. Comment, *U. Ill. L. Rev.* 453, 470 (1981). Compensable losses which cannot be reduced to a mathematical certainty, i.e. pain and suffering and loss of society, are the types of losses that accrue at the moment of death, are not subject to discounting, but are subject to pre-judgment interest.

The courts of other circuits have applied the measure of damages for loss of society without reducing the award to its present value. *Drachenberg v. Canal Barge Co., Inc.*, 621 F.2d 760 (5th Cir. 1980).

When the element of damage has accrued prior to the date of judgment, the compensation received at judgment or settlement necessarily is not an advance payment. Accordingly, when an award for loss of society is computed from the date of its accrual, upon the death of decedent, pre-judgment interest must be given if the plaintiff is to recover for the actual amount of her losses, which are equal to the amount of damage plus interest to the date of payment. This is the only method to remedy the

deficiency between the actual value of the award at payment and the value of that award at the time it accrued.

No federal court has ever suggested that intangible damages must be discounted to present value in wrongful death cases; such damages have always been undiscounted because of their very nature. In cases of death, loss of society accrues at the moment of death. It is fixed; to the extent that loss of society is capable of quantification under *Gaudet*, it follows that any delay between the time of death and time of receipt of compensation for the loss must be compensated for by allowing pre-judgment interest on the entirety of the award. No authority supports dividing loss of society into subparts which have already accrued and ones which have not yet accrued. To the contrary, the Fifth Circuit Court of Appeals, in contrast to the Seventh Circuit below, clearly allows pre-judgment interest on the entirety of an award. *Drachenberg v. Canal Barge Co., Inc.*, 621 F.2d 760 (5th Cir. 1980).

In the case at bar, the Seventh Circuit opinion concedes the lack of clarity in determining how and when pre-judgment interest is to be added to the damages award. (App. A p. A-5) The court also unequivocally states: "We cannot conclude the law precludes an award of pre-judgment interest on intangible damages." (App. A p. A-7) Then the court continues by remanding the case to the district court to determine "pre-judgment interest for pain and suffering or for *past* loss of society" (App. A p. A-7) (emphasis supplied). The appellate court's opinion requires by its terms that the award for loss of society must be divided into temporal components. Yet the trial court found that loss of society, like pain and suffering, is compensable in a lump sum, without reduction for present value. The trial court treated non-pecuniary losses differently from the pecuniary losses for which it made specific findings distinguishing past from future accrual of loss. The reason for this distinction is a practical one. The division into temporal units for non-pecuniary loss is an impossible determination for a judge or jury.

The appellate court's remand for computation of "past loss of society" illustrates the confusion which persists in determining pre-judgment interest under maritime law. The appellate court has gone too far in making a temporal distinction where none exists. The absence of standards for courts to follow in this area results in the inconsistent analysis and imposition of pre-judgment interest, as well as conflict among the circuits, as evidenced in the case at bar.

Damages for loss of society, like those for pain and suffering or disfigurement, "turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation. . . . [i]nsistence on mathematical precision would be illusory." *Gaudet*, 414 US at 590; 39 L.Ed. 2d at 24 (citations omitted). A just estimation of loss of society upon death of a loved one does not turn upon any certain quantification, nor is it easily reducible to a yearly rate. The total injury to the family unit accrues upon the fatal event. Reducing loss of society into temporal components for the purpose of limiting recovery of pre-judgment interest would be an arbitrary and illusory transformation of the intangible loss into one of a pecuniary nature capable of precise mathematical quantification. As with an award for pain and suffering, an attempt to reduce to present worth the factfinder's common sense assessment of the value of the cost of society is both arbitrary and artificial. See 22 Am. Jur. 2d *Damages* § 108.

To the extent that its opinion requires a division of loss of society into past and future components, the Seventh Circuit has abandoned "the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction." *Gaudet*, 414 US at 588, 39 L.Ed. 2d at 23. It has also arbitrarily reduced the recovery of the widow and child herein to an amount less than that to which they were entitled after waiting three and one-half years for compensation. The artificiality of this result is particularly poignant in the case at bar where there was no dispute as to the defendant's liability.

Defendant's admission of liability herein reinforces the fact that not only was the loss final on the day of death, but also this was not a case which required a trial to determine the culpable party; liability was admitted. Further, the decision is in conflict with the treatment of pre-judgment interest in the Fifth Circuit, which clearly allows pre-judgment interest on the entirety of the award.

The policy of solicitude as expressed in *Moragne* and *Gaudet*, and their progeny, *Stiles*, *Moore*, *Drachenberg* and *Metcalf*, requires rejection of the Seventh Circuit's analysis.

CONCLUSION

For the foregoing reasons, it is imperative that this court issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit to eliminate the conflict among the Circuits and to establish specific standards for admiralty courts, clearly establishing that there is full pre-judgment interest for loss of society caused by wrongful death.

Respectfully submitted,

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APPENDIX

APPENDIX A

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

No. 83-1702

Evelyn Hillier, Individually and as
Administratrix of the Estate of
Henry Hillier, Deceased,
Plaintiff-Appellant,

v.

Southern Towing Company,
Defendant and Third-Party Plaintiff,
and

United States of America,
Third Party Defendant,
and

In The Matter Of The Complaint Of
Memphis Towing Company, a Corporation,
for Exoneration from, or Limitation
of Liability,
Appellee,

and

In The Matter Of The Complaint Of
C. F. Industries, Inc., as Bareboat
Charterer and Owner *pro hac vice*
of the Barge CF-105-B, for Exoneration
from, or Limitation of Liability,
Appellee.

Appeal from the United States District Court for the
Southern District of Illinois, Alton Division.
Nos 80 C 5030 and 80 C 5331—**William L. Beatty**, *Judge*.

ARGUED MAY 11, 1984—DECIDED AUGUST 3, 1984

Before FLAUM, *Circuit Judge*, PELL, *Senior Circuit Judge*,
and KELLAM, *Senior District Judge*. *

FLAUM, *Circuit Judge*. The sole issue presented for review in this court is whether the district court, pursuant to its admiralty jurisdiction, erroneously denied the plaintiff prejudgment interest on the damages award for future loss of support and services, pain and suffering, and loss of society for the death of her husband. For the reasons which follow, we affirm in part and reverse in part.

I.

This suit stems from the accidental death of Henry Hillier in September 1979. The defendants-appellees filed Petitions for Exoneration or Limitation of Liability in Admiralty. Although defendants initially denied liability for plaintiff's wrongful death claims, prior to trial they filed unqualified admissions of liability. The case proceeded to trial only on the issue of damages. A companion civil case against Southern Towing Company was tried contemporaneously before a jury and the same jury served in an advisory capacity for the admiralty claims.¹

* Honorable Richard B. Kellam, Senior District Judge for the Eastern District of Virginia, is sitting by designation.

¹ For related litigation see *Hillier v. Southern Towing Co.*, 714 F.2d 714 (7th Cir. 1983).

After trial the jury assessed the plaintiff's damages at \$520,000. The district judge, sitting in admiralty, adopted the jury's assessment and entered judgment against defendants-appellees in that amount. The damages were broken down as follows: \$35,000 for past support; \$210,000 as the present value of the future loss of support (discounted to time of trial); \$95,673 as the present value for future services; \$6,583.35 for past loss of services; \$5,000 for decedent's conscious pain and suffering; and \$172,743.65 for loss of society. After extensive briefing on the issue, the district court awarded prejudgment interest on past loss of support and services but denied prejudgment interest on the damages for future loss of support and services and on damages for pain and suffering and loss of society. Plaintiff appeals from the judgment of the district court.

II.

Upon a review of the case law cited by the parties it is evident that there are "well-established" rules that, upon further investigation, are not that "well-established" in actuality. Plaintiffs assert that the propriety of awards of prejudgment interest in admiralty cases is clearly settled.² *Masters v. Transworld Drilling Co.*, 688 F.2d 1013 (5th Cir. 1982). *McCormack v. Noble Drilling Corp.*, 608 F.2d 169 (5th Cir. 1979). The decision of whether to award prejudgment interest lies within the sound discretion of the district court; however, it is an abuse of discretion to deny prejudgment interest absent "peculiar circumstances" justifying denial. *Noritake Co., Inc. v. M/V Hellenic Champion*, 627 F.2d 724 (5th Cir. 1980); see also *First National Bank of Chicago v. Material Service Corp.*

² Federal courts sitting in admiralty have generally been favorable to awards of prejudgment interest and there is a relatively separate body of admiralty case law dealing with the issue. *First National Bank of Chicago v. Material Service Corp.*, 597 F.2d 1110 (7th Cir. 1979); *National Airlines v. Stiles*, 268 F.2d 400, 405 (5th Cir. 1959). See also Comment "Prejudgment Interest: Survey and Suggestion" 77 Nw. U.

“Peculiar circumstances” have been found to justify denial of prejudgment interest in circumstances where, for example, the plaintiff improperly delays the pursuit of a claim; or where there is a genuine dispute over a good faith claim in situations of mutual fault. *Noritake*, 627 F.2d at 728. The existence of “peculiar circumstances” is a factual issue and is reviewed on the basis of a “clearly erroneous” standard. *Id.* at 729. If the determination is not clearly erroneous, the appellate court reviews the award or denial of prejudgment interest for abuse of the trial court’s discretion. *Id.*

The other “well-established” rule in admiralty cases, cited by defendants, is that the doctrine of *restitutio in integrum* controls the determination of the appropriateness of the award of prejudgment interest. The doctrine of *restitutio in integrum* provides that a plaintiff is to be placed in the position previously enjoyed prior to the time he or she sustained damages; the plaintiff is to be made whole, in monetary terms. See *Petition of the City of New York*, 332 F.2d 1006 (2d Cir. 1964); *National Airlines v. Stiles*, 268 F.2d at 405. Defendants suggest that plaintiff has already been made whole by the award and, therefore, prejudgment interest was appropriately denied.

These two “well-established” doctrines are not mutually exclusive, rather, the two doctrines complement one another. Prejudgment interest has often been awarded to recovering plaintiffs in order to award “fair and just compensation for the pecuniary loss sustained” thereby making plaintiffs whole. *First National Bank of Chicago v. Material Service Corp.*, 597

L. Rev. 192, 214 (1982). The rationale for awarding prejudgment interest was that such an award fairly and completely compensated the party sustaining damages because the damaged party lost the use of the ship as well as the use of the damages money prior to judgment. The general admiralty rule favoring awards of prejudgment interest has also been expanded to wrongful death claims and personal injury claims under the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*, and under the Jones Act, 46 U.S.C. § 688. *McCormack v. Noble Drilling Corp.*, 608 F.2d 169 (5th Cir. 1979); *National Airlines v. Stiles*, 268 F.2d at 400.

F.2d at 1121; *National Airlines v. Stiles*, 268 F.2d at 405. The award of prejudgment interest is only designed to compensate a plaintiff and is not awarded as a penalty. *Noritake*, 627 F.2d at 728. The real dispute arises in the interpretation of the doctrine of *restitutio in integrum* and how courts assess damages.

While it is clear that an award of prejudgment interest in admiralty is appropriate, what is unclear is how and when prejudgment interest is to be added to the damages award. See generally *Annot.*, 34 A. L. R. Fed. 126 (1977). Several courts, without much discussion have awarded prejudgment interest on the entire damages award. See *Drachenberg v. Canal Barge Company*, 621 F.2d 760 (5th Cir. 1980); *McCormack v. Noble Drilling Corp.*, 608 F.2d 169 (5th Cir. 1979). Other courts have tried to calculate damages more precisely by dividing damages into past and future losses. These courts have discounted the present value for future losses to the date of trial and awarded prejudgment interest only for those losses accruing prior to judgment. *Petition of the City of New York*, 332 F.2d at 1008-9; *Red Star Towing & Transportation Co., Inc. v. Cargo Ship "Ming Giant"*, 563 F. Supp. 224 (S.D. N.Y. 1983); *Hamilton v. Canal Barge Company, Inc.*, 395 F. Supp. 978 (E.D. La. 1975); *Petition of Marina Mercante Nicaraguense, S.A.*, 248 F. Supp. 15 (S.D. N.Y. 1965), *modified on other grounds*, 364 F.2d 118 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967). Cf. *In Re Air Crash Disaster Near Chicago*, 644 F.2d 633 (7th Cir. 1981).³

³ *In Re Air Crash Disaster Near Chicago*, while not directly relevant because it is a diversity case rather than an admiralty suit, is useful as an example of how damages may be calculated. In that case, the district court instructed the jury to calculate the present cash value of plaintiff's damages to be computed as of the date of death. The district court awarded prejudgment interest to bring "death value" to present value as part of plaintiff's "fair and just compensation." This Court affirmed the award of prejudgment interest but instructed that in future cases juries should be instructed to calculate both future and past losses to the date of trial thereby precluding the need to award prejudgment interest. *Id.* A district court, sitting in admiralty, could follow the same formula.

In turning to the facts of this case, we note that the district judge (and the advisory jury) divided damages for support and loss of services into future and past components. Another aspect of the damages award, loss of society, was not divided into the same components. The judge granted prejudgment interest only for past losses. The district court did not award prejudgment interest on the amount of decedent's pain and suffering or for the plaintiff's loss of society. The district judge noted that the law does not allow for prejudgment interest for the intangible damages of pain and suffering and loss of society.

The district court, within its discretion, appropriately divided damages between past and future losses. In addition, the district court properly, within its discretion, refused to award prejudgment interest on the future damages which had been discounted to present value as of the date of the trial. See *Petition of the City of New York*, 332 F.2d at 1008 ("[t]o the extent that there are elements of future losses which are represented in the final damages prejudgment interest is, of course, not appropriate"); *Red Star Towing v. Cargo Ship "Ming Giant"*; *Hamilton v. Canal Barge Company, Inc.*, 395 F. Supp. at 992; *Petition of Marina Mercante Nicaraguense*, 248 F. Supp. at 26.

The district court erred, however, in its determination that "the law does not allow for prejudgment interest for . . . intangible damages (pain and suffering and loss of society)." Slip op. at 4. Several courts, sitting in admiralty, have awarded prejudgment interest on such intangible damages as pain and suffering, loss of society and loss of nurture and guidance (in cases where there are surviving children). In *Petition of Marina Mercante Nicaraguense*, the court divided up damages into past and future damages and awarded prejudgment interest on all past damages, including damages for pain and suffering and loss of nurture and guidance. *Id.* at 25-36. In *Hamilton v. Canal Barge Company, Inc.*, the court divided the damages awards between past and future damages and awarded prejudgment interest on all past damages. The past damages included loss of

society and loss of nurture and guidance. (The court found there was no conscious pain and suffering and, consequently, did not award anything on that element of damages.) *Id.* In *Drachenberg v. Canal Barge Company*, the court of appeals approved an award of damages that was not divided into past and future components. Prejudgment interest was granted on the entire damages award. The damages included compensation for pain and suffering and loss of society. *Id.* at 762. We cannot conclude that the law precludes an award of prejudgment interest on intangible damages.⁴ We do not find that a court might properly conclude that an award of prejudgment interest is inappropriate under certain circumstances for only intangible damages; we merely conclude that the law does not preclude such an award. The district court erred in concluding that the law did not allow such an award.

III.

The district court erred in its determination that it could not award prejudgment interest for pain and suffering and for past loss of society. Consequently, we reverse and remand that portion of the case denying the plaintiff prejudgment interest for pain and suffering or for past loss of society. The district court should consider if there are any peculiar circumstances precluding awards of prejudgment interest on those two aspects of the damages. If there are no peculiar circumstances, the district court should award the plaintiff prejudgment interest on all the past losses. The district court's judgment denying prejudgment interest of future losses is affirmed.

A true Copy:

Teste:

*Clerk of the United States Court
of Appeals for the Seventh Circuit*

⁴ The distinction between "liquidated" and "unliquidated" damages has not been determinative in admiralty cases. See *First National Bank v. Material Service Corp.*; *Moore-McCormack Lines v. Richardson*, 295 F.2d 583, 592 (2d Cir. 1961).

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS**

No. 80 5030

Evelyn Hillier, Individually and as
Administratrix of the Estate of
Henry Hillier, Deceased,
Plaintiff,

v.

Southern Towing Company,
Defendant and
Third Party Plaintiff,
and

United States of America,
Third Party Defendant,
and

No. 80 5331

In the Matter of the Complaint of
Memphis Towing Company, a Corporation,
for Exoneration from, or Limitation of,
Liability.

and

No. 81 5216

In the Matter of the Complaint of
C.F. Industries, Inc., as Bareboat
Charterer and Owner *pro hac vice*
of the Barge CF-105-B for Exoneration
from or Limitation of Liability.

ORDER

This Court having heard the evidence and the arguments of counsel, and the jury in the case of Hillier v. Southern Towing having rendered its verdict, THE COURT HEREBY FINDS AS FOLLOWS:

1. Plaintiff, Evelyn Hillier, is the widow and administratrix of the Estate of Henry Hillier, deceased. On September 27, 1979, Hillier was 23 years old and was employed by the United States Coast Guard as a marine safety inspector. At that time, he was inspecting a group of three anhydrous ammonia barges which were discharging cargo at a C.F. Industries, Inc., dock, near Pine Bend, Minnesota. These barges carry liquid anhydrous ammonia at a low temperature. While plaintiff was walking across one of the barges during the unloading process, a relief valve discharged anhydrous ammonia into the atmosphere immediately above where Henry Hillier was standing. Hillier was caught in an ammonia vapor cloud and was unable to get off the barge, though he ran toward the dock until he collapsed and died on the barge, leaving a two-year old daughter and his wife, age 24 surviving. Defendants, Memphis Towing Company and C.F. Industries, Inc. have admitted that they were negligent, that their vessels were unseaworthy, and that their negligence and the unseaworthiness of the vessels caused the death. They have also admitted that decedent was free of contributory negligence. Thus, this Court need only decide the proper amount of the judgment herein and assess the prejudgment interest. The jury, (which was advisory for the limitation proceeding) found on January 13, 1983 that the plaintiff's total damages were \$520,000.00.

2. The family's share of loss of support herein is found to be \$9,000.00 from the date of death until October 1, 1980, \$10,000.00 for the following year, October 1, 1980 to October 1, 1981, \$12,000.00 for the following year, October 1, 1981 to October 1, 1982 and \$4,000.00 from October 1, 1982 to the present, for a total of \$35,000.00 for past support. These figures

were stipulated by the parties. The Court further finds the figure of \$210,000.00 as the present value at the time of trial of the future loss of support.

3. This Court finds the reasonable value of the services which the decedent would have provided had he lived to be \$2000.00 per year. This amounts to \$6583.35 for services up to January 13, 1983 and a present cash value of future services in the amount of \$95,673.00.

4. This Court finds that the value of decedent's conscious pain and suffering is \$5,000.00.

5. This Court finds that the loss of society herein is \$172,743.65.

6. Judgment is entered in favor of claimant, Evelyn Hillier, and against Memphis Towing Company in the sum of \$520,000.00 plus pre-judgment interest in the amount of 11½ percent on only that portion of the award which includes past loss of support and past loss of services which is computed as follows:

$$\begin{aligned} 9000.00 + 2000.00 \times .115 \div 12 \times 30 \text{ mo.} &= 3162.60 \\ 12000.00 + 2000.00 \times .115 \div 12 \times 18 \text{ mo.} &= 2070.00 \\ 14000.00 + 2000.00 \times .115 \div 12 \times 6 \text{ mo.} &= 805.02 \\ 4000.00 + 583.35 \times .115 \div 12 \times 2.5 \text{ mo.} &= 109.80 \\ &\$6147.42 \end{aligned}$$

The total judgment against Memphis Towing Company is \$526,147.42 including pre-judgment interest. Judgment is entered against Memphis Towing Company in that amount.

7. Claimant's motion for pre-judgment interest on the remainder of the award is denied for the reason that this Court is of the opinion that the law does not allow for pre-judgment interest for the intangible damages (pain and suffering and loss of society) or for the future loss of support and services.

8. Judgment is rendered in favor of claimant, Evelyn Hillier, and against C.F. Industries, Inc. in the sum of \$526,147.42 including pre-judgment interest in the sum of \$6147.42 plus costs and expenses in the sum of \$13,270.25 for a total judgment in favor of claimant, Evelyn Hillier, against C.F. Industries, Inc., in the sum of \$539,417.67.

DATED: This 5 day of April, A.D. 1983.

/s/ WILLIAM L. BEATTY
UNITED STATES DISTRICT JUDGE

NOTE: CLERK TO SEND COPIES TO ALL PARTIES.

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

No. 80-5030

**Evelyn Hillier, Individually, and
as Administratrix of the Estate of
Henry Hillier, Deceased,
Plaintiff,**

v.

**Southern Towing Company,
Defendant and Third-
Party Plaintiff,
and**

**United States of America,
Third-Party Defendant.**

and

No. 80-5331

**In The Matter Of The Complaint
Of Memphis Towing Company, A
Corporation, For Exoneration
From, Or Limitation Of,
Liability.**

and

No. 82-5216

**In The Matter Of The Complaint Of
C.F. Industries, Inc., as Bareboat
Charterer and Owner *pro hac vice*
of the Barge CF-105-B for Exonera-
tion from, or Limitation of,
Liability.**

STIPULATION REGARDING LIABILITY

Come now C.F. Industries, Inc., Southern Towing Company and Memphis Towing Company, by their attorneys, and stipulate that C.F. Industries, Inc. and either Southern Towing Company or Memphis Towing Company (whichever is found to be the operator of the M/V BAXTER SOUTHERN, a fact which Memphis Towing Company admits but Southern Towing Company denies and which must therefore later be determined at trial) are liable for the death of decedent Henry Hillier and are willing to pay a reasonable amount of damages to the decedent's personal representative, Evelyn Hillier, to be determined at trial. If trial should result in a judgment in excess of the respective limitation funds, C.F. Industries, Inc. and Memphis Towing Company reserve the right to introduce evidence at a subsequent hearing in support of their claims for limitation of liability.

C. F. INDUSTRIES, INC.

By Its Attorneys

SOUTHERN TOWING
COMPANY

By Its Attorneys

MEMPHIS TOWING
COMPANY

By Its Attorneys

**SUPPLEMENTAL STIPULATION REGARDING
LIABILITY**

Come now Southern Towing Company and Memphis Towing Company, by their attorneys, and stipulate they are liable for the death of decedent Henry Hillier and are willing to pay a reasonable amount of damages to the decedent's personal representative, Evelyn Hillier, to be determined at trial. If trial should result in a judgment in excess of Memphis Towing Company's limitation fund, Memphis Towing Company reserves the right to introduce evidence at a subsequent hearing in support of its claim for limitation of liability.

**SOUTHERN TOWING
COMPANY**

By Its Attorneys

**MEMPHIS TOWING
COMPANY**

By Its Attorneys

3
No. 84-765

Supreme Court, U.S.

FILED

DEC 28 1984

ALEXANDER I. STEVAS

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

EVELYN HILLIER, Individually and as Administratrix of
the Estate of HENRY HILLIER, Deceased,

Petitioners,

vs.

SOUTHERN TOWING COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to The United States Court of Appeals
for the Seventh Circuit

**BRIEF OF RESPONDENT
MEMPHIS TOWING COMPANY
IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI**

GOLDSTEIN and PRICE

GARY T. SACKS

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Attorneys for Respondent

Memphis Towing Company

QUESTION PRESENTED FOR REVIEW

Was the U.S. Court of Appeals for the Seventh Circuit correct in holding that prejudgment interest should be added only to those elements of damage which had matured prior to trial, and not to the present value, at trial, of future damage items (such as future loss of support, society and services) which had not yet been sustained by the decedent's beneficiaries as of the date of judgment?

LIST OF PARTIES

The parties to the proceeding whose judgment is sought to be reviewed are:

Plaintiff - EVELYN HILLIER, Individually and as
Administratrix of the Estate of Henry
Hillier, Deceased

Defendants - SOUTHERN TOWING COMPANY*
MEMPHIS TOWING COMPANY*
C.F. INDUSTRIES, INC.

* Southern Towing Company and Memphis Towing Company are affiliated corporations. Pemiscot Towing Company and Rebco Towing Company, Inc., are affiliates of Southern Towing Company and Memphis Towing Company.

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No. 84-765

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**BRIEF OF RESPONDENT
MEMPHIS TOWING COMPANY
IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI**

STATEMENT OF THE CASE

Petitioner filed suit individually and as administratrix of the estate of Henry Hillier, a 23-year old Coast Guard officer who died on September 27, 1979 as the result of an escape of gas from a barge he was inspecting. Liability was admitted and the sole issue at trial was the proper measure of damages to be awarded under the general maritime law for the benefit of Hillier's surviving widow, child and estate.

Petitioner's diversity suit against Respondent Southern Towing Company was tried to a jury, which sat simultaneously in an

advisory capacity to the district judge in two consolidated limitation actions which had been filed as a result of Hillier's death by Respondents Memphis Towing Company and C.F. Industries, Inc. The district judge instructed the jury to assess damages for (1) the conscious pain and suffering sustained by the decedent before he died, (2) the present value, at trial, of the past and future loss of support sustained by Hillier's beneficiaries, (3) the present value, at trial, of the past and future loss of Hillier's services sustained by his beneficiaries, and (4) a lump-sum award for the beneficiaries' loss of society with no reduction for present value. The jury returned a verdict on January 13, 1983 for \$520,000.

On April 5, 1983 the district court entered judgment in the two limitation proceedings, awarding Petitioner total damages of \$520,000, apportioned as follows: \$5,000 for decedent's conscious pain and suffering; \$35,000 for loss of support sustained between decedent's death and the date of trial and \$210,000 as the present value, at trial, of the future loss of support; \$6,583.35 for past loss of services and \$95,673 as the present value, at trial, of future lost services; and \$172,743.65 as a lump-sum award for loss of society. The district court awarded prejudgment interest on the elements of past loss of support and past loss of services, but denied Petitioner's request for prejudgment interest on all other items of damage.

On appeal, the U.S. Court of Appeals for the Seventh Circuit held that prejudgment interest may be awarded on all past losses in a maritime wrongful death claim. It therefore remanded the case to the district court to consider whether prejudgment interest should be assessed on the award for the decedent's "pain and suffering, or for past loss of society," *Hillier v. Southern Towing Co.*, 740 F.2d 583, 586 (7th Cir. 1984). However, the Seventh Circuit held the district court was correct in denying prejudgment interest on all elements of future damages:

"...the district court properly, within its discretion, refused to award prejudgment interest on the future damages

which had been discounted to present value as of the date of the trial. See *Petition of the City of New York*, 332 F.2d at 1008 (“[t]o the extent that there are elements of future losses which are represented in the final damages prejudgment interest is, of course, not appropriate”); *Red Star Towing v. Cargo Ship “MING GIANT”*; *Hamilton v. Canal Barge Company, Inc.*, 395 F.Supp at 992; *Petition of Marina Mercante Nicaraguense*, 248 F.Supp. at 26.” *Ibid.*

Petitioner contends in her Petition for Writ of Certiorari that the Seventh Circuit should have ordered the district court to award prejudgment interest on the entire award for loss of society, including future loss of society.

ARGUMENT

Respondent Memphis Towing Company submits the Petition for Writ of Certiorari should be denied. The Seventh Circuit correctly ruled that prejudgment interest should only be assessed on past losses, not on future elements of damage.

The long-standing rule in admiralty has been to award prejudgment interest on past losses sustained by the Plaintiff prior to trial, in order to restore the Plaintiff to the same condition which would have existed had the loss not occurred. *The Baltimore*, 75 U.S. (8 Wall) 377, 385, 19 L.Ed. 463, 465 (1869); *National Airlines, Inc. v. Stiles*, 268 F.2d 400, 405 (5th Cir. 1959) *cert. den.* 361 U.S. 885, 80 S.Ct. 157 (1959). The delay from date of loss to date of judgment has no effect on losses which the Plaintiff has not yet sustained as of the date of trial. The Plaintiff is fully compensated for such future losses by awarding their present value as of the date of trial; therefore, it is neither necessary nor appropriate to add prejudgment interest to an award for future losses. *Petition of the City of New York*, 332 F.2d 1006 (2nd Cir. 1964) *cert. den.* 379 U.S. 922, 85 S.Ct. 277 (1964); *Petition of Marina Mercante Nicaraguense*, 248 F.Supp. 15, 25-26 (S.D.N.Y. 1965) *modified on other grounds*, 364 F.2d 118 (2nd Cir. 1966), *cert. den.* 385 U.S. 1005, 87 S.Ct. 710 (1967); *Nye v. A/S D/S Svendborg*, 358 F.Supp. 145, 152-54 (S.D.N.Y. 1973), *modified on other grounds*, 501 F.2d 376 (2nd Cir. 1974) (affirmed on liability and damages); *Red Star Towing & Transportation Company, Inc. v. Cargo Ship "MING GIANT"*, 563 F.Supp. 224, 226 (S.D.N.Y. 1983); *Hamilton v. Canal Barge Company, Inc.*, 395 F.Supp. 978, 992 (E.D.La. 1975); *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 595 (2nd Cir. 1961); *Martin v. Jones*, 296 F.Supp. 878, 883 (E.D.La. 1968); *Hillier v. Southern Towing Co.*, 740 F.2d 583 (7th Cir. 1984).

In maritime wrongful death cases, the usual procedure is to calculate damages by first determining what losses the survivors incurred between the date of decedent's death and the date of

trial, and then adding to that figure the present value, as of the date of trial, of expected future losses. When this approach is followed, the courts have uniformly held that prejudgment interest is not to be awarded on the future items; to do so would result in the plaintiff being over-compensated. *Petition of Marina Mercante Nicaraguense, supra*; *Nye v. A/S D/S Svendborg, supra*; *Hamilton v. Canal Barge Company, Inc., supra*; *Moore-McCormack Lines, Inc. v. Richardson, supra*; *Red Star Towing & Transp. v. Cargo Ship "MING GIANT", supra*.

"The awards are to be computed on a 2-stage basis: (1) the damages to the date of decision are to be totalled without discount and increased by prejudgment interest, and (2) future damages are to be discounted to their present value." *Petition of Marina Mercante Nicaraguense, supra*, at 25-26.

Only in those cases where the survivors' entire loss is discounted back to the date of decedent's death is it proper to add prejudgment interest to the entire award, in order to compensate the Plaintiff for the loss of the money between the date of death and the date judgment is entered. For example, in *National Airlines, Inc. v. Stiles, supra*, the Court of Appeals noted that the widow's damages were calculated by the district court "as of the date of her husband's death, and interest on the amount was awarded to make her recovery complete" (emphasis added) 268 F.2d at p. 405. However, the Court went on to state that where damages are calculated by determining their present value as of the date of trial, rather than discounting them back to the date of death, "the court should not, of course, allow interest on such amount." *Ibid* at 405.

Petitioner argues, without citation of legal authority, that damages for loss of society all "accrue at the moment of death" (Petition for Writ of Certiorari, p. 4). Therefore, she contends, prejudgment interest should have been assessed on the entire award for loss of society. This argument is fallacious. Loss of

society does not all accrue at the moment of death. To the contrary, loss of society simply begins at death and thereafter is an ongoing loss which, like loss of support and services, is sustained by the decedent's beneficiaries throughout all the years they would have spent with the decedent had he continued to live. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 586, 94 S.Ct. 806, 815 (1974); *Gill v. United States*, 285 F.Supp. 253, 262 (E.D. Tex. 1968) *aff'd*, 449 F.2d 765 (5th Cir. 1971); *Fox v. Pacific Southwest Airlines*, 133 Cal.App.3d 565, 570-571, 184 Cal.Rptr. 87, 89 (1982).

If the decedent and his beneficiaries are young, as in this case, they presumably would have lived together for many years had decedent not died. Under such circumstances, most of the beneficiaries' loss of society does not actually occur until long after judgment is entered.

In the present case, the district judge actually overcompensated Petitioner at trial by instructing the jury to award loss of society as a lump sum. It would have been better to instruct the jury to separate loss of society into past and future components, as they did with loss of support and loss of services, and then to reduce future lost society to its present value at trial. See *Petition of Marina Mercante Nicaraguense*, *supra*; *Nye v. A/S D/S Svendborg*, *supra*. If the award for future lost society had properly been discounted to its present trial value, this would have significantly reduced the amount of the verdict.

Having already recovered her full loss of society, with no reduction for present value, the Petitioner is certainly not entitled to an additional windfall which would result if she was now awarded prejudgment interest on that part of the loss of society which still remained a future loss as of the date judgment was entered.

Petitioner does cite cases [see e.g. *Drachenberg v. Canal Barge Co., Inc.*, 621 F.2d 760 (5th Cir. 1980); *Complaint of Metcalf*, 530 F.Supp. 446, 460-461 (S.D.Tex. 1981); *Con-*

solidated Machines, Inc. v. Protein Products Corp., 428 F.Supp. 209 (M.D. Fla. 1976)] in which prejudgment interest was added to the entire judgment in a wrongful death proceeding. However, in each of those cases the court simply awarded prejudgment interest automatically without analyzing the issue. By contrast, the cases (cited at p.5 of this Brief) which do discuss the rationale behind prejudgment interest clearly delineate between past and future losses, and uniformly hold, as did the Seventh Circuit in this case, that prejudgment interest should only be assessed on losses which occurred prior to trial.

CONCLUSION

The Seventh Circuit correctly held that prejudgment interest may be awarded on past losses, but not on future damages which are valued as of the date of trial but which have not yet been sustained when judgment is entered. The Seventh Circuit's decision is not in conflict with other federal courts of appeal or this Court, and does not involve any important question of federal law that requires review by this Court. The Petition for Writ of Certiorari should accordingly be denied.

Respectfully submitted,

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2
No. 84-765

Office-Supreme Court, U.S.
FILED

DEC 29 1984

ALFONSO C. STEVENS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

EVELYN HILLIER, Individually and as Administratrix of
the Estate of HENRY HILLIER, Deceased,

Petitioners,

vs.

SOUTHERN TOWING COMPANY, *et al.*,

Respondents.

**BRIEF OF RESPONDENT C. F. INDUSTRIES, INC.,
AS BAREBOAT CHARTERER AND OWNER
PRO HAC VICE OF THE BARGE CF-105-B IN
OPPOSITION TO PETITIONERS' PETITION FOR
A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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QUESTION PRESENTED

Whether, under the admiralty rule of *restitutio in integrum*, the district court may properly divide damages recoverable for loss of society between that loss occurring from date of death to date of judgment and that loss which will occur in the future from date of judgment and award prejudgment interest on the prejudgment loss only.

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A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

OPINIONS BELOW

The opinion of the court of appeals is reported at 740 F.2d 583 (7th Cir. 1984) (Petitioners' Appendix A). The opinion of the district court is reported at ____ F.Supp. ____ (N.D.Ill. 1983) (Petitioners' Appendix B).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

ARGUMENT

1. The Decision of the Seventh Circuit Court of Appeals in this Action is Consistent with Established and Approved Guidelines that Govern an Award of Prejudgment Interest in Admiralty.

The authority and circumstances under which an award of prejudgment interest may be awarded in admiralty are found in *The Scotland, Dyer & Others v. National Steam Navigation Company*, 118 U.S. 507, 6 S.Ct. 1174, 30 L.Ed. 153 (1886). The rationale supporting an award of prejudgment interest for suits in admiralty was well stated by the Eighth Circuit Court of Appeals in *Federal Barge Lines, Inc. v. Republic Marine, Inc.*, 616 F.2d 372, 373 (8th Cir. 1980), wherein the court held that prejudgment interest should be awarded in the interest of restitution. “. . . [S]uch an award is for the purpose of fully compensating an injured party for its losses.” *Id.* See *United States v. M/V GOPHER STATE*, 614 F.2d 1186, 1189-90 (8th Cir. 1980); *Bunge Corp. v. American Commercial Barge Line Co.*, 630 F.2d 1236 (7th Cir. 1980). See also *Socony Mobil Oil Co. v. Texas Coastal and International, Inc.*, 559 F.2d 1008, 1014 (5th Cir. 1977). The same rationale was implicitly recognized by this Court in *West v. Harris*, 573 F.2d 873 (5th Cir. 1978), *cert.denied*, 440 U.S. 946, 99 S.Ct. 1427, 59 L.Ed.2d 635 (1978).

In *West*, the Fifth Circuit held that prejudgment interest is awarded when necessary to compensate an injured plaintiff; it is not allowed when it is not a necessary element of compensation.

As above noted this Court denied certiorari, and since the appellate court remanded the case for the district court to award prejudgment interest as an element of compensation to plaintiff, it may fairly be said that this Court has implicitly recognized this rationale of awarding prejudgment interest.

It is Respondent's position herein that by affirming the denial by the district court of the Petitioners' claim for prejudgment interest for future loss of society, the court of appeals correctly

concluded that said interest was not a necessary element of compensation. This position is in accord with the above expressed guidelines.

A second guideline established by *The Scotland, supra*, and followed among the circuits is that the award of prejudgment interest, in the absence of statutory directives, rests in the discretion of the trial court. *Cargill, Inc. v. Taylor Towing Serv., Inc.*, 642 F.2d 239, 241 (8th Cir. 1981); *Bunge Corp. v. American Commercial Barge Line Co., supra*, 630 F.2d 1236; *Mid-America Transportation Co. v. Rose Barge Line, Inc.*, 477 F.2d 914, 916 (8th Cir. 1973). This Court has tacitly approved this position in *Lodges 743 & 746, International Ass'n of Machinists v. United Aircraft Corp.*, 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825, 97 S.Ct. 79, 50 L.Ed.2d 87 (1976). This guideline was followed by both the district court and the court of appeals in the present lawsuit as to an award of prejudgment interest for future losses. The cause was remanded for the sole purpose of having the district court determine whether there were any peculiar circumstances; and, if not, an award of prejudgment interest on all *past* losses was to be granted. The court of appeals' affirmance of the denial of prejudgment interest on Petitioners' future loss of society is well within the discretion permitted as above noted.

The Petitioners' argument (Page 7 of Petition) that the Seventh Circuit conceded the lack of clarity in determining the issue as to when to grant prejudgment interest on the damage award is not supported by the language cited by Petitioners in support thereof. The Seventh Circuit correctly recognized the authority of the district court to award prejudgment interest for pain and suffering and for *past* loss of society. The Seventh Circuit coupled that statement with its affirmative action of remanding the case to the district court with instructions that the district court consider whether there are any peculiar circumstances to deny an award of prejudgment interest for pain

and suffering and past loss of society. The action of the Seventh Circuit constitutes an exercise of the discretion of the court in these matters afforded under the doctrine of *restitutio integrum*. Petitioners should not be allowed to use semantics to cloud the clear language and action of the Seventh Circuit. The Seventh Circuit Court of Appeals is simply directing the district court to make the petitioners whole.

Damages for pain and suffering are past damages when, as in the instant case, they occur between the time of the injury and the death therefrom and prior to the date of judgment. The same cannot be said to support Petitioners' contention that prejudgment interest should be awarded for all loss of society damages, some of which must of necessity occur from the date of death and prior to judgment and some of which must occur in the future and subsequent to the judgment. Petitioners are no less whole in this case when prejudgment interest is denied for these *in futuro* damages of loss of society. Petitioners' damage for loss of society in the future has yet to occur and awarding prejudgment interest on this amount would result in a windfall. Prejudgment interest on Petitioners' loss of society damages would also result in a penalty on the Respondent and thus would be contrary to the general policy supporting prejudgment interest. "In admiralty . . . prejudgment interest is *not* awarded as a penalty but is in the nature of compensation for use of funds." *Socony Mobil Oil Co., Inc. v. Texas Coastal and International, Inc.*, *supra*, 559 F.2d at 1014.

The fact that some courts, as cited by the Petitioners, have awarded prejudgment interest on total damage awards should not be taken as compelling a change in the applicable standards and compel such awards by this or any other court. Rather, the entry of such awards is merely an affirmative exercise of the discretion permitted to each district court and court of appeals by this Court in assessing the propriety of damage awards in admiralty actions.

In the instant case, the acceptance by the appellate court of the “lump sum” award for pain and suffering while rejecting the “lump sum” award for loss of society entered by the district court (Page 3 of Petition) does not support the argument by Petitioners that such illustrates the need for “standards” or that such is in conflict with decisions of this Court.

In summary, the decision rendered by the Seventh Circuit Court of Appeals in this case is fully in accord with both the rationale and the discretionary guidelines established by this Court and followed in admiralty cases among the various circuits as shown above. Petitioners have failed to show the absence of guidelines to be followed by the courts. In addition Respondent has shown herein that guidelines exist and that they were followed in this case. For these reasons the petition for writ of certiorari on this point should be denied.

2. No Conflict Exists Among the Circuits.

The present decision by the Seventh Circuit Court of Appeals is not only consistent with established guidelines but is also in accord with other decisions by the various courts of appeals in which the issue of prejudgment interest on future losses has been fully presented. The overwhelming majority of cases cited by Petitioners involve awards of prejudgment interest for ascertainable and pecuniary damages and not prejudgment interest for nonascertainable future losses. The cited cases also do not support Petitioners’ argument that the Seventh Circuit Court of Appeals should have awarded prejudgment interest on the entire loss of society award. Upon close inspection of the cited cases a legitimate conflict among the circuits is not to be found.

The Seventh Circuit Court of Appeals in *In re Air Crash Disaster Near Chicago, Ill., etc.*, 644 F.2d 633, 645-46 (7th Cir. 1981), considered prejudgment interest as to future losses arising after trial in the context of a wrongful death action. Although that case arose from different factual circumstances

and liability was predicated on the Illinois Wrongful Death Act (Ill.Rev.Stat. Ch. 70, Sec. 2), it is controlling on the issue. The court in *In re Air Crash Disaster*, based its prejudgment interest analysis on the admiralty decisions rendered in *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583 (2d Cir. 1961), *cert.denied*, 368 U.S. 989, 82 S.Ct. 606, 7 L.Ed.2d 596 (1962), and *National Airlines v. Styles*, 268 F.2d 400 (5th Cir. 1959), *cert.denied*, 461 U.S. 885, 80 S.Ct. 157, 4 L.Ed.2d 121 (1959). In *Moore-McCormack* and *National Airlines*, the Second and Fifth Circuits allowed awards of prejudgment interest in the death actions brought under the Death On the High Seas Act, 46 U.S.C. Secs. 761-768. Both cases illustrate two different approaches in calculating prejudgment interest.

In *Moore-McCormack*, *supra*, the future losses were discounted to the date of trial and interest was allowed only on past losses. This is the approach adopted by the court of appeals in the present case. The only distinction between *Moore-McCormack* and the present lawsuit is that in the instant case neither the district court nor the Seventh Circuit required petitioners' future loss of society damages to be discounted to present value at time of trial. The reason for this is not apparent. However, it is suggested herein that Petitioners are better off as a result. In *National Airlines*, the entire award was discounted to the date of death and interest was added to the entire amount for the period from the date of death to the date of judgment. 268 F.2d at 405-406. It should be noted that this Court denied certiorari in the *Moore-McCormack* and *National Airlines* cases.

Considering its reliance on admiralty law, *In re Air Crash Disaster* unassailably stands for the proposition that prejudgment interest should not be awarded for *in futuro* damages. The Seventh Circuit Court of Appeals stated in *In re Air Crash Disaster*, "[I]nterest is implicit in the calculation of the present value of plaintiff's . . . loss as of the date of trial." 644 F.2d at 641.

In the present lawsuit, Petitioners' ascertainable *in futuro* damages were reduced by the trial court to the present value as of the time of trial. Petitioners' *in futuro* damages for loss of society were not so discounted in this manner. Having been fully compensated for *in futuro* losses, Petitioners are therefore not entitled to prejudgment interest for future loss of society damages running from the date of judgment into the future. The reliance of the Court of Appeals upon *In re Air Crash Disaster* and upon *Moore-McCormack* is apparent in its order expressly denying prejudgment interest on Petitioners' damages for future loss of society. As such, the decision is fully consistent with decisions of the other circuits as well as decisions within the Seventh Circuit.

The discretionary power vested in the courts, as discussed above, accounts for what Petitioners believe to be a conflict among the circuits. Petitioners, however, fail to recognize that the application of the rule favoring prejudgment interest in admiralty actions is indeed discretionary. *Cargill, Inc.*, *supra*, 642 F.2d at 239. The same discretionary application of the rule has also been extended to cases other than admiralty which were determined as matters of federal law. *United States v. California State Bd. of Equalization*, 650 F.2d 1127 (9th Cir. 1981), *aff'd*, 456 U.S. 901, 102 S.Ct. 1744, 72 L.Ed.2d 157, *rehearing denied*, 456 U.S. 985, 102 S.Ct. 2261, 72 L.Ed.2d 864 (1982). It has been held *not* to be an abuse of discretion to *deny* prejudgment interest in admiralty when the district court either concludes that plaintiff has been fully compensated or that special circumstances exist. *Bunge Corp.*, *supra*, 630 F.2d at 1236.

There is thus no conflict among the circuits as all circuits follow the general rule allowing a discretionary award of prejudgment interest to insure that the plaintiff has received full compensation. This is the rule which was followed in this lawsuit. Furthermore, the general rule permitting a denial of prejudgment interest if special circumstances exist was also followed in this case. The special circumstances were that Peti-

tioners' future loss of society damages were unliquidated and were yet not discounted to present value.

The decision of the Seventh Circuit Court of Appeals is in full accord with established guidelines endorsed by this Court as discussed above. Moreover, no actual conflict exists among the circuits when the case by case discretionary power of the trial court is taken into account.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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